IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 14 OF 2006

Shri Ulhas Soma Dhargalkar,
Aged 46 years, businessman,
Resident of House No. 265,
Sorvem Vaddo, Guirim,
Bardez Goa.
(Registered Addresses) ..... Appellant

V e r s u s

State of Goa. ..... Respondent

Mr. P. A. Kholkar, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State-Respondent.

CORAM : N. A. BRITTO, J.

DATE : 8th MARCH, 2006.

P. C.

Admit.

2. Heard forthwith.

3. The appellant stood surety to the accused on 23.01.2004 in Special Criminal Case No. 5/2001, before the Special Judge, N.D.P.S. Court,

Mapusa. This was after the accused in the said case was convicted and sentenced on 25.11.2003 under Section 18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The said accused filed an appeal being Criminal Appeal No. 4/2004, which came to be dismissed by this Court. After the dismissal of the appeal, the learned trial Court issued a notice to the said accused on or about 23.09.2004, presumably calling upon the accused to surrender before the said Court to undergo the sentence. The said notice was unserved and on or about 06.11.2004, a NBW was issued against the accused and later a proclamation as well. On 05.09.2005, the learned trial Court was pleased to issue a notice to the surety (Appellant herein), to produce the accused on 19.09.2005 and on 19.09.2005, the surety remained present before the Court but without the accused and, as the Presiding Officer of the trial Court was on leave, the case was adjourned to 28.09.2005. On this day, the surety sought time and the case was adjourned to 03.10.2005.

4. On 03.10.2005, the surety appeared again and sought time to produce the death certificate of the accused within two weeks and, accordingly, the case was adjourned to 17.10.2005. On 17.10.2005, the surety again sought time and the case was adjourned to 07.11.2005, but on

07.11.2005, the surety remained present but the Presiding Officer was on leave and the case was adjourned to 21.11.2005. On 21.11.2005, the surety remained present along with the brother of the accused and filed the affidavit of the latter along with the death certificate, which showed that the accused had died on 15.10.2005 and the case was adjourned to 30.11.2005. On this day, the surety again remained present along with the brother of the accused. Certain documents were filed on record and the relevant portion of the Order as disclosed in the roznama reads as follows:

> "The surety shall forfeit the bond amount in favour of the State within a month from today. S.O. for forfeiture of bond amount on 29.12.2005."

5. When the case was taken up again on 29.12.2005, the learned trial Court observed as follows:

> "As the surety has failed to forfeit the bail bond amount, warrant of attachment to issue in favour of the Collector, North Goa, Mapusa, to realise the amount of Rs.50,000/- and send the compliance report on or before 19.01.2006".

6. At the time of hearing, it is observed that the challenge posed by the surety is to the Order dated 30.11.2005 by which, the learned trial Court had contemplated that the surety would forfeit the bond amount in favour of the State within a month from that day and not the Order dated 29.12.2005 by which, the warrant of attachment was issued to the Collector. Shri Kholkar, the learned Counsel on behalf of the appellant/surety, seeks leave to amend the memo of appeal so as to challenge the Order dated 29.12.2005.

7. Leave granted. Amendment to be carried out forthwith.

8. Shri Sardessai, the learned Public Prosecutor, submits that if the accused died on 15.10.2005, then the question of the surety seeking leave of the learned trial Court to produce the death certificate of the accused on 03.10.2005, would not arise. Shri Sardessai, the learned P.P. further submits that the surety ought to have produced the accused immediately after the notice was issued to him and since he failed to produce the accused, the surety was liable for forfeiture of the bail amount. Shri Sardessai, has placed reliance on the case of ***Sham Sunder v. State of***

Delhi (1990 CRI. L. J. 2370) and ***Mohammed Kunju & anr. v. State of Karnataka (2000 CRI. L. J. 165)***.

9. I have perused the said decisions. There can be no quarrel with the proposition that no speaking order is required to forfeit a bond. The said two decisions do not concern the controversy which we are required to decide herein. Nevertheless, a passage from ***Sham Sunder*** (supra) will certainly support the view I am taking. It reads thus:

> "In ***Ghulam Mehdi v. State of Rajasthan, AIR 1960 S.C. 1185)***, it has been held that notice to show cause is liable to be issued to the surety only to explain as to why he should not be made to pay the amount of the bond already forfeited as penalty. In ***Fatehchand Wadhumal v. Emperor, (AIR 1940 Sind 136)***, while interpreting the similar provisions of the old Criminal P.C. contained in Section 514, a Division Bench of the said High Court clearly held that a bond for appearance stands forfeited when accused does not appear and it does not require the Court to issue notice to show cause why the bond should not be forfeited. Similar view has been laid down by a single Judge of Orissa High Court in

> ***Ramananda Choudhury v. State of Orissa, (1978 CRI. L. J. 597).*** I hold that it was not necessary for the Magistrate to have passed any specific order in so many words that the bond stood forfeited before issuing notice to the surety under Section 446 of the Cr. P. C. to explain why the amount of the bond which stood forfeited be not realised from him as fine. The surety bond of the petitioner stood forfeited as soon as breach of the terms of the bond was committed on failure of the accused to appear in Court on the dates fixed by the Court and failure of the surety to produce the accused and the accused having been declared proclaimed offender."

10. Section 446 of the Code of Criminal Procedure, 1973, deals with procedure when the bond has been forfeited. Sub-section (1) thereof provides that :

> "Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited,

> or where in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid."

Explanation below sub-section (1) reads thus :

> "A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred."

11. Sub-section (2) of Section 446 of the Code reads as follows:

> "If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the

> same as if such penalty were a fine imposed by it under this Code:
>
> Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months."

12. Sub-section (3) of Section 446 further provides that the Court may, after recording its reasons for doing so, remit any portion of the penalty mentioned and enforce payment in part only. It is not necessary to refer to sub-sections (4) and (5) of Section 446 of the Code.

13. Admittedly, after notice to the accused came to be unserved and the NBW came to be unexecuted, the learned trial Court called upon the surety to produce the accused and, as can be seen from the history of the proceedings reproduced hereinabove, the surety went on asking time for the production of the accused until 30.11.2005, when the learned trial Court ordered that "*the surety shall forfeit the bond amount in favour of the State within a month from today*". The expression '*forfeit*', inter alia, means to incur a penalty; to become liable to the payment of a sum of money, as

the consequence of a certain act. (See page 650, Black's Law Dictionary, Sixth Edition). Since the surety was called upon to produce the accused and the time was extended from time to time, the bond executed by the surety would have stood forfeited in terms of the Order dated 30.11.2005 after one month therefrom in case the surety had failed to produce the accused as required and, in fact, the surety did forfeit the said bond on or about 29.12.2005. However, as we have seen hereinabove, Section 446 stipulates that after the bond is forfeited, the Court is required to call upon the surety or the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid and such a notice has been prescribed in Form No. 48 in the second Schedule to the said Code.

14. It can thus be seen that Section 446 (1) and (2) contemplate two stages. The first stage is for the Court to satisfy itself that the bond has been forfeited and that the Court has satisfied that the bond has been forfeited, then it has to proceed towards realisation of the forfeited amount of the bond and, for this purpose, the Court has to give the surety a notice either to pay the penalty or to show cause why it should not be paid. If there are sufficient circumstances before the Court on the basis of which it can accept show cause, it did not proceed any further but if the cause is to

be rejected, then only the question comes of recovering the amount due either in whole or in part as the circumstances of the case justify.

15. Admittedly, no such notice was issued to the surety after he defaulted in producing the accused thirty days after 30.11.2005, either calling upon him to pay the amount due on the surety bond or showing cause as to why the same should not be recovered from him and without following such procedure, the learned trial Court proceeded to recover the entire amount due on the bond by the said surety and that too without assigning any reasons though the learned trial Court has used the word '*forfeit*' in the Order dated 29.12.2005. The surety was certainly required a notice to be given calling upon him to pay the amount due on the bond after he defaulted to produce the accused or show cause why the amount due on the bond should not be recovered from him. Since no such procedure was followed by the learned trial Court, the Order dated 29.12.2005, ordering that the entire amount of Rs.50,000/- should be recovered from the surety by issuing a warrant of attachment, is liable and deserves to be set aside.

16. Consequently, the appeal deserves to succeed and the Order

dated 29.12.2005, ordering the entire amount of Rs.50,000/- due by the surety on the bond executed by him, is hereby set aside. The learned trial Court shall issue a notice to show cause to the surety calling upon him to pay the amount due on the said bond or show cause as to why the same should not be recovered from him as contemplated by Section 446 of the Code. The surety shall appear before the trial Court to receive such notice and file a reply thereto on 31st instant at 10.00 a.m.

N. A. BRITTO, J.

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